BRB No. 99-0337

WILLIE INGRAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COASTAL STEVEDORING	)	DATE ISSUED: Dec. 14, 1999
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order - Motion for Reconsideration and Award of Attorney's Fees of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Thomas J. Henry (Law Offices of Thomas J. Henry), Corpus Christi, Texas, for claimant.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order - Motion for Reconsideration and Award of Attorney's Fees (97-LHC-2816) of Administrative Law Judge Donald W. Mosser rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was injured on November 16, 1990, when he was struck by multiple 110

pound bags of flour. Claimant underwent a surgical procedure on his back on February 4, 1993. Although he has never returned to employment duties on the docks, claimant has held a variety of short-term jobs post-injury. Employer voluntarily paid claimant temporary total disability compensation from November 17, 1990 through May 2, 1997. Claimant thereafter filed a claim under the Act seeking reinstatement of his benefits.

Prior to the formal hearing, claimant and employer attempted to settle all of claimant's claims for compensation and medical benefits arising from his November 16, 1990, work-related injury for the lump sum of $22,000. In an Order Denying Application for Section 8(i) Settlement, Administrative Law Judge Mills denied the parties' settlement application, finding that the forfeiture of future medical treatment provided in the settlement was not in the best interests of claimant. The case was thereafter assigned to Administrative Law Judge Mosser (the administrative law judge).

In his Decision and Order, the administrative law judge found that claimant had reached maximum medical improvement as of August 8, 1994, and that employer established the availability of suitable alternate employment as of August 1, 1995. The administrative law judge then found that claimant failed to establish that he was unable to secure such employment. The administrative law judge credited claimant's testimony regarding his prior, yearly earnings in calculating claimant's average weekly wage and denied the compensation benefits sought by claimant as his wage-earning capacity in the alternate employment exceeded his average weekly wage. Claimant was awarded future medical expenses for care related to his injury. Claimant's motion for reconsideration was denied by the administrative law judge.

On appeal, claimant challenges the administrative law judge's denial of his claim for compensation benefits asserting, *inter alia*, that he should be entitled to either compensation under the Act or the benefit of the previously denied settlement agreement which he had entered into with employer. Employer has not responded to this appeal.

Claimant initially asserts that the administrative law judge erred in failing to find that he diligently yet unsuccessfully sought employment post-injury.[1] We disagree. Where, as in the instant case, employer has established the availability of suitable alternate employment, claimant can nevertheless establish entitlement to total disability benefits if he demonstrates that he diligently tried and was unable to secure such employment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d

[1]We note that claimant has not appealed the administrative law judge's finding that employer met its burden of establishing the availability of suitable alternate employment; accordingly, that finding is affirmed.

687, 18 BRBS 79 (CRT)(5th Cir. 1986); *see also Edwards v. Director, OWCP,* 999 F.2d 1374, 1376 n.2, 27 BRBS 81, 84 n.2 (CRT)(9th Cir. 1993), *cert. denied,* 114 S.Ct. 1539 (1994); *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Martiniano v. Golten Marine Co.*, 23 BRBS 363, 366 (1990). Claimant does not have to seek the exact jobs identified by employer in order to establish due diligence. *See Palombo*, 937 F.2d at 74, 25 BRBS at 8 (CRT).

Contrary to claimant's contention, substantial evidence supports the administrative law judge's conclusion that claimant was successful in his search for post-injury employment. In addressing this issue, the administrative law judge relied upon claimant's testimony that he diligently searched for alternate employment post-injury and that he had in fact received several job offers as a result of his efforts. *See* Decision and Order at 6; Transcript at 25, 41-44. The administrative law judge thus concluded that claimant failed to establish that he was unable to secure employment post-injury.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses; additionally, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's specific finding that claimant successfully sought employment post-injury is rational and is supported by the testimony of claimant himself. Accordingly, we affirm the administrative law judge's finding that claimant failed to demonstrate that he diligently tried and was unable to secure employment post-injury.

Claimant next contends that the administrative law judge erred in calculating his average weekly wage at the time of his injury. Specifically, while not asserting error by the administrative law judge in his use of Section 10(c) of the Act, 33 U.S.C. §910(c), claimant challenges the mathematical calculation used by the administrative law judge.

In the instant case, the administrative law judge initially determined that Section 10(c) of the Act was to be used to calculate claimant's average weekly wage. Decision and Order at 6. The object of Section 10(c) is to provide a method to determine a sum which reasonably represents the claimant's annual earning capacity at the time of his injury when Sections 10(a) and 10(b) are unavailable because claimant has not been regularly employed. *See Richardson v. Safeway*

Stores, Inc., 14 BRBS 855 (1982). It is well-established that the administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See generally Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). The Board will affirm an administrative law judge's determination of a claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Richardson,* 14 BRBS at 855; *Hicks v. Pacific Marine & Supply Co., Ltd.,* 14 BRBS 549 (1981).

Given the state of the record, which contains no documentation regarding claimant's rate of pay or earnings for any employer prior to November 1990, the administrative law judge determined claimant's average weekly wage by relying upon the testimony of claimant himself, who stated that in the year prior to his work-injury he earned $6,000. Transcript at 28. Based upon this testimony, the administrative law judge concluded that claimant was capable of earning $115.38 per week at the time of his November 1990 injury. As there is no documentary evidence as to claimant's actual hourly rates or earnings at any time prior to his November 1990 work-injury,[2] we must conclude the result reached by the administrative law judge is reasonable, as it is supported by the relevant evidence of record. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Gilliam v. Addison Crane Co.,* 21 BRBS 91 (1988). We therefore affirm the administrative law judge's determination of claimant's average weekly wage at the time of his injury with employer.

Lastly, claimant asserts that "it is unfair for Claimant to be denied the benefit of the settlement agreement entered between the Claimant and the employer as inadequate and then be denied any wage benefits under the subsequent order of the Administrative Law Judge." *See* Claimant's brief at 5. Accordingly, claimant asserts that he should be entitled to the benefit of the prior settlement agreement which he entered into with employer.[3]

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[2]Although claimant additionally testified that he had previously received as much as $13.60 per hour working on the docks, that prior to commencing his employment with employer on the day of his injury he had received wages in the range of $9.00 - $10.00 per hour, and that he was hired by employer at a rate of $5.00 per hour, claimant submitted no evidence in support of these statements, *see* Transcript at 12-13; similarly, claimant submitted no documentary evidence regarding either his prior earnings or the number of hours that he worked for any employer pre-injury. Employer's LS-202 indicates that claimant was hired at an hourly rate of $4.50, and it is uncontroverted that claimant worked for four hours for employer prior to his injury.

[3]As set forth, *supra,* Judge Mills initially disapproved the proposed settlement, and the

case was thereafter assigned to Judge Mosser for hearing.

Section 8(i) of the Act, as amended in 1984, 33 U.S.C. §908(i)(1994),[4] provides for the settlement of claims for compensation by a procedure in which an application for settlement is submitted for the approval of the district director or administrative law judge.

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[4]Section 8(i)(1), as amended in 1984, states:

> Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

33 U.S.C. §908(i)(1)(1994).

Claimants are not permitted to waive their right to compensation except through settlements approved under Section 8(i). *See* 33 U.S.C. §§915, 916; *see generally Henson v. Arcwel Corp.*, 27 BRBS 212 (1993). The procedures governing settlement agreements are delineated in the implementing regulations at 20 C.F.R. §§702.241-702.243.

In the instant case, Judge Mills, after taking into consideration the fact that the proposed settlement agreement foreclosed all future medical reimbursement to claimant and that claimant's potential future medical costs were substantial, determined that the proposed settlement was not in claimant's best interests. Contrary to claimant's contention on appeal, the subsequent denial of claimant's request for continuing compensation benefits does not render the prior settlement denial invalid; moreover, claimant was awarded reasonable and necessary future medical care for his work-related back condition.[5] As claimant has failed to establish reversible error with regard to the proposed settlement, his argument is rejected.[6]

Accordingly, the Decision and Order and Supplemental Decision and Order of the administrative law judge, as well as the Order Denying Application for Section 8(i) Settlement of Administrative Law Judge Mills, are affirmed.

SO ORDERED.

ROY P. SMITH

[5]We note that under the Act an injured employee is entitled to disability benefits for any period that his work injury causes a total or partial loss of wage-earning capacity. *See Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 321, 31 BRBS 129 (CRT)(5th Cir. 1997). Thus, should claimant's subsequent work-related medical treatment result in a loss of wage-earning capacity, claimant may seek an appropriate remedy under the Act.

[6]Claimant's request that the Board approve the aforementioned settlement agreement is without merit; the Board does not have the "equitable" power to approve a settlement agreement of the parties, as the Board's authority is limited by statute. 33 U.S.C. §921(b). *See Rochester v. George Washington University*, 30 BRBS 233 (1997).

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge